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MICHAEL RODAK, JR., C

No. 72-1121

In the
Supreme Court of the United States
October Term, 1972

JOHN H. ELLIS, *et al.*,
Petitioners,

vs.

FLYING TIGER CORPORATION,
Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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1. The questions raised by petitioners concern not the propriety of the District Court judgment but the impropriety of the decision of the Court of Appeals. Nevertheless, the respondent rests on findings of fact—unsupported by record evidence—made by the Court of Appeals and contradicting those made by the trial court. Clearly, then, the decision below was in conflict with the judgments of other circuits on the question where the fact-finding function properly belongs.

2. Given the respondent's premise, that the Court of Appeals could properly substitute its own findings for those of the trial court and, therefore, that the petitioners made no contribution to the restoration of rights to the preferred stockholders, the Court of Appeals would have no basis for awarding a fee of $75,000, which it did. The

award of that fee makes it clear that there was a "substantial" contribution made by petitioners but that the appellate court resorted to a different measure of compensation—an hourly rate rather than a portion of the benefit conferred. Again, then, the decision of the Court of Appeals is in conflict with those of other circuits.

3. Respondent, by its *ipse dixit*, would remove its actions from those calling for "corporate therapeutics." The fact is that Flying Tiger manipulated the payment of dividends to dilute the newly acquired interests of its preferred stockholders, to the tune of some $4,000,000. If this does not call for "corporate therapeutics," it is hard to know what does. The respondent's indignation is typical of a defendant in a case calling for imposition of counsel fees; it is not a reason for not doing so.

4. There is no reluctance on the part of petitioners to assert their economic interests in the outcome of this case. Their petition is based on the proposition that the function of the award of fees is to provide adequate incentive to counsel to undertake representation in cases of this sort. The strained suggestion (in the starred footnote on page one of the Brief in Opposition) that petitioners misused the "original title," is typical of respondent's flimsy allegations. The "original title" was the one imposed by the respondent in the Court of Appeals after "[a]ll other parties were dismissed pursuant to the settlement agreement which ended the action except as to a 'reasonable fee' for plaintiffs' counsel."

5. The cases cited by respondent in support of its position emphasize rather than dilute petitioner's allegations that there is a conflict in the circuits as to: 1) the proper standards to be applied in the fixing of counsel fees; 2) the authority of the Court of Appeals to

substitute itself for the trial court in the finding of facts; 3) the proper procedure to be utilized where the Court of Appeals rejects findings of fact made by the trial court.

6. Despite respondent's elaborated and extended contentions against the substantially contingent nature of petitioners' fee arrangements, it remains that the district court considered the facts and found the arrangements to be substantially contingent. The Court of Appeals (while it made its own contrary findings in other areas) did not indicate it was disturbing this finding or disagreeing with it. And its own award was more than the restrictive dollar limit of the agreement of petitioners with their clients.

Petitioners respectfully suggest that a writ of certiorari should issue to the Court of Appeals for the Seventh Circuit in this case so that the conflicts among the circuits can be resolved and proper standards might be established for fixing counsel fees for actions such as this one. For, as respondent points out: "*Mills* itself makes no reference to the quantum of fees to be awarded but is concerned solely with *whether* such an award is appropriate". Brief in Opposition, p. 10, n*. (Emphasis in Original.)

Respectfully submitted,

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